

1 THOMAS G. GILMORE, ESQ.
2 State Bar No. 91984
3 LAW OFFICES OF THOMAS G. GILMORE
3232 FOURTH AVENUE
3 SAN DIEGO, CALIFORNIA 92103
4 (619) 426-4444

5 Attorney for Material Witnesses

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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10 (Honorable Jan M. Adler)

11 UNITED STATES OF AMERICA,) CASE NO. 08MJ1643 JMA
12)
13 Plaintiff,) NOTICE OF MOTION; MOTION FOR
14) VIDEOTAPE DEPOSITION AND
15 vs.) SUBSEQUENT VOLUNTARY DEPORTATION
16) OF MATERIAL WITNESS; MEMORANDUM
17) OF POINTS AND AUTHORITIES AND
18) DECLARATION OF THOMAS G. GILMORE
19) IN SUPPORT THEREOF
20)
21) DATE: June 24, 2008
22) TIME: 2:00 p.m.
23)
24 Defendants.) PLACE: Courtroom of Magistrate
25) Jan M. Adler
26)

27 TO: UNITED STATES ATTORNEY; DEFENDANTS AND THEIR ATTORNEYS OF
28 RECORD:

29 PLEASE TAKE NOTICE that on June 24, 2008 at 2.00 p.m. or as
30 soon thereafter as the matter may be heard, material witnesses Jose
31 Luis GOMEZ-Torres, Eduardo Alejandro RAMIREZ-Hernandez, Oscar David
32 LOPEZ-Torres, and Juan Luis HERNANDEZ-Morales will move the Court
33 for an Order that they be subjected to a videotape deposition prior
34 to trial and subsequent voluntary deportation.

35 This motion will be based on 18 U.S.C. 3144 in that the
36 witnesses testimony can be adequately secured by deposition and

1 further detention is not necessary to prevent a failure of justice.

2 This motion is further based on this notice of motion, the
3 memorandum of points and authorities and declaration of Thomas G.
4 Gilmore filed herewith, and as such other and further evidence as
5 may be presented at the hearing of the motion.

6 Respectfully submitted,

7 DATED: 6/13/08

/ss/Thomas G. Gilmore
8 THOMAS G. GILMORE, Attorney for
Material Witnesses

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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10 (Honorable Jan M. Adler)

11 UNITED STATES OF AMERICA,) CASE NO. 08MJ1643 JMA
12)
13 Plaintiff,) DECLARATION OF THOMAS G. GILMORE
14) IN SUPPORT OF MOTION FOR
vs.) VIDEOTAPE DEPOSITION AND
15 Enrique RIVERA-Garcia,) SUBSEQUENT VOLUNTARY DEPORTATION
Richardo PERALTA-Zazueta,) OF MATERIAL WITNESSES
16)
17 Defendants.) DATE: June 24, 2008
) TIME: 2:00 p.m.
) PLACE: Courtroom of Magistrate
Jan M. Adler

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I, Thomas G. Gilmore declare:

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I am an attorney duly licensed to practice before all the courts of this State, District and Circuit, and am the attorney of record for the material witnesses in the above action, Jose Luis GOMEZ-Torres, Eduardo Alejandro RAMIREZ-Hernandez, Oscar David LOPEZ-Torres, and Juan Luis HERNANDEZ-Morales.

I have personal knowledge of the facts set forth in this action and could testify competently thereto if called.

My clients in this action have been in federal custody since May 24, 2008 because they cannot locate anyone to post bond for them.

1 My clients entered the United States to find work to support
2 family members at home in their country of origin. Each day they
3 remain in custody is an additional hardship on themselves and their
4 families.

5 Based on the above it respectfully requested that this motion
6 be granted, that said depositions take place at the earliest
7 possible time, and that my clients be allowed to voluntarily return
8 home to their country of origin immediately thereafter.

9 I declare under the penalty of perjury under the laws of the
10 State of California that the foregoing is true and correct of my own
11 personal knowledge except as to those matters stated to be based
12 upon information and belief and, as to those matters, I am informed
13 and believe that they are true and correct.

14 Executed this 13th day of June, 2008, in San Diego, California.

/ss/ Thomas G. Gilmore
THOMAS G. GILMORE, Attorney for
Material Witnesses

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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10 (Honorable Jan M. Adler)

11 UNITED STATES OF AMERICA,) CASE NO. 08MJ1643 JMA
12)
13 Plaintiff,) MEMORANDUM OF POINTS AND
14) AUTHORITIES IN SUPPORT OF
15 vs.) VIDEOTAPE DEPOSITION AND
16) SUBSEQUENT VOLUNTARY DEPORTATION
17 Enrique RIVERA-Garcia,) OF MATERIAL WITNESSES
18 Ricardo PERALTA-Zazueta,)
19)
20)
21 Defendants.) DATE: June 24, 2008
22) TIME: 2:00 p.m.
23) PLACE: Courtroom of Magistrate
24)
25 I Jan M. Adler

19 **BY STATUTE AND CASE LAW,**

20 **THE MOTION SHOULD BE GRANTED**

21 According to 18 U.S.C. 3144, "no material witness may be
22 detained because of inability to comply with any condition of
23 release if the testimony of such witness can be adequately secured
24 by deposition and if further detention is not necessary to prevent
25 a failure of justice".

26 Furthermore, Fed R. Crim P. 15(a) specifies that a material
27 witness may make a motion requesting such a deposition and the
28 district court has the authority to order the taking of the

1 deposition and thereafter to discharge the detained witness from
2 custody.

3 As the Fifth Circuit stated In Aguilar-Ayala v. Ruiz, 973 F.2d
4 411 (1992) at page 413:

5 Read together, Rule 15(a) and section 3144 provide a
6 detained witness with a mechanism for securing his own
7 release. He must file a "written motion", Fed. R. Crim.
8 P. 15(a), requesting that he be deposed. The motion must
9 demonstrate that his "testimony can adequately be secured
10 by deposition" and that "further detention is not necessary
11 to prevent a failure of justice" 18 U.S.C. section 3144.
12 Upon such showing, the district court must order his
13 deposition and prompt release. Id. ("No material witness
14 may be detained" if he makes such a showing). Although
15 Rule 15(a) is couched in the permissive "May" not the
16 mandatory "shall", Fed R. Crim. P. 15(a) ("the court...may
17 direct that the witness' deposition be taken"), it is
18 clear from a conjunctive reading with section 3144 that
19 the discretion to deny the motion is limited to those
20 instances in which the deposition would not serve as an
21 adequate substitute for the witness' live testimony: that
22 a "failure of justice" would ensue were the witness
23 released...absent a "failure of justice", the witness must
be released.

24 Any ambiguity in Rule 15(a) was resolved when the statute was
25 amended in 2002 to differentiate between motions for depositions
brought by other parties as opposed to such motions brought by the
material witness himself. The new statutory language holds that
when a material witness files their own motion for a deposition,
they do not even need to show any "exceptional circumstances" exist.
The amended statute has already been upheld on appeal, United States
v. Chen (N.D. Cal. 2003) 214 F.R.D. 578.

26 This is also the law in the Ninth Circuit as demonstrated by
27 the case of Torres -Ruiz v. United States District Court for the
Southern District of California, 97 CDOS 5335 (July 7, 1997). The
court "agreed with the reasoning of [Aguilar-Ayala, supra]" and
reversed Judge Huff who had denied a motion for a deposition on

1 facts virtually identical to the instant action . As the court
2 stated:

3 In the instant case, two young men ages 19 and 22, have
4 apparently been randomly selected out of a group of 27
5 undocumented aliens and detained for a period of over 60
6 days as material witnesses in a straightforward and
7 uncomplicated alien smuggling prosecution. These young
8 men state without opposition by either party to this case
9 that they are the sole support for their respective
families in Mexico, and that every day they remain in
custody is a tremendous hardship on those family members.
(Kilpatrick Declaration at 2) Neither petitioner is able
to provide a surety for \$1000.00 bond. It is exactly
circumstances such as these for which section 3144 appears
to be designed.

Respectfully submitted,

LAW OFFICES OF THOMAS G. GILMORE

DATED: 6/13/08

By: /ss/ Thomas G. Gilmore

Thomas G. Gilmore, Esq.

Attorney for Material Witnesses

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(Honorable Jan M. Adler)

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UNITED STATES OF AMERICA,) CASE NO. 08MJ1643 JMA
vs.)
Plaintiff,) CERTIFICATE OF SERVICE
Defendants.)

DATE: June 24, 2008
TIME: 2:00 p.m.
PLACE: Courtroom of Magistrate
Jan M. Adler

I, hereby certify that on today's date, I electronically filed
the attached documents with the Clerk of the Court using the CM/ECF
system, which will automatically send electronic notification of
such filing and a copy of such filings to the following:

Candis Lea Mitchell, Esq. - Candis-Mitchell@fd.org
William R. Burgener, Esq. - william_burgener@yahoo.com
Efile.dkt.gc2@usdoj.gov

Date: June 13, 2008

By: /ss/Thomas G. Gilmore
THOMAS G. GILMORE, Attorney for
Material Witnesses